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TONY PUA KIAM WEE v. KERAJAAN MALAYSIA & ANOTHER APPEAL

COURT OF APPEAL, PUTRAJAYA
AHMADI ASNAWI JCA
KAMARDIN HASHIM JCA
B YEOH WEE SIAM JCA
[CIVIL APPEALS NO: W-01-(IM)(NCVC)-399-11-2017 &
W-02-(IM)(NCVC)-2293-11-2017]
10 JULY 2018

C ***TORT:*** *Misfeasance in public office – Allegation of – Action against Prime Minister for tort of misfeasance in public office – Whether Prime Minister public officer – Whether permissible for court to apply common law meaning of 'public officer' – Whether statutory interpretation of term 'public officer' could be used for common law interpretation of same term in law of tort of misfeasance in public office* D *– Whether claim against Government grounded on vicarious liability sustainable – Whether appellate intervention warranted – Interpretation Acts 1948 and 1967, s. 3 – Federal Constitution, arts. 132(1), (3) & 160(2)*

STATUTORY INTERPRETATION: *Definitions – 'Public officer' – 'Member of the administration' – Whether permissible for court to apply common law meaning* E *of 'public officer' – Whether statutory interpretation of term 'public officer' could be used for common law interpretation of same term in law of tort of misfeasance in public office – Interpretation Acts 1948 and 1967, s. 3 – Federal Constitution, arts. 132(1), (3) & 160(2)*

F The appellant ('plaintiff'), as a Member of Parliament, brought the suit against the respondents ('defendants') in his personal capacity and as a Malaysian taxpayer. The plaintiff's claim against the first defendant was based on the cause of action of the tort of misfeasance committed in public office. The plaintiff contended that the first defendant was a public official by virtue of then being, *inter alia*, the Prime Minister, the Finance Minister G and the Chairman of the Board of Advisors for 1Malaysia Development Berhad ('1MDB'). The plaintiff alleged that in those capacities, the first defendant had, *inter alia*, a direct or indirect role in the decisions and directions of 1MDB and had, in such capacities, knowingly and/or recklessly approved various 1MDB agreements and transactions resulting in H an unlawful and surreptitious dissipation and/or misappropriation of 1MDB funds. According to the plaintiff, the first defendant had knowledge that his conduct would lead to loss, harm and damage to all Malaysian citizens. The plaintiff's claim against the second defendant was that the Government of Malaysia was vicariously liable for the matters pleaded by virtue of the first I defendant's capacity as a government servant and his acts done in his public

capacity. The first and second defendants filed encls. 13 and 26, at the High Court, to strike out the plaintiff's writ of summons and statement of claim. The High Court allowed the said applications. Hence, these appeals. The issues that arose were (i) whether the first defendant was a public officer; and (ii) whether, in the absence of a specific definition of 'public officer' for the purposes of the law of the tort of misfeasance in Malaysia, the common law meaning accorded to the term could be adopted and used.

Held (dismissing appeals)
Per Yeoh Wee Siam JCA delivering the judgment of the court:

(1) It was not permissible for the court to apply the common law meaning of 'public officer' where there is written law in force in Malaysia to define the meaning of the words. The written law is s. 3 of the Interpretation Acts 1948 and 1967 ('the Acts'), which is a statute of general interpretation. After considering the definitions of, *inter alia*, 'public officer', 'public services,' 'Minister', and 'Prime Minister' in s. 3 of the Acts, and arts. 132(1), (3) & 160(2) of the Federal Constitution on the interpretation of 'member of the administration', the Court of Appeal in the case of *Tun Dr Mahathir Mohamad & Ors v Datuk Seri Mohd Najib Tun Haji Abdul Razak* ('*Tun Mahathir*') ruled that the Prime Minister was not a 'public officer.' In light of the said decision of *Tun Mahathir*, which spelt out clearly the statutory interpretation of the term 'public officer', this court decided to similarly rule that for the purpose of the present case, the first defendant, in his capacity as the Prime Minister, was not a 'public officer.' (paras 42-44)

(2) The statutory interpretation of the term 'public officer' thus far in case laws was only for the useful purpose of interpreting written law, but could not and must not be used for the common law interpretation of the same term in the law of tort of misfeasance in public office. Thus, in view of this court's decision that the first defendant was not a public officer, it followed that the plaintiff's claim against the first defendant was obviously unsustainable and ought to be struck out. Consequently, the plaintiff's claim against the second defendant grounded on the latter's vicarious liability for the first defendant could not be sustained at all and ought to be struck out. There was no merit warranting appellate intervention. (paras 45, 47 & 48)

Bahasa Malaysia *Headnotes*

Perayu ('plaintif'), sebagai ahli Parlimen, memfailkan guaman terhadap responden-responden ('defendan'defendan') dalam kapasiti peribadinya dan sebagai pembayar cukai Malaysia. Tuntutan plaintif terhadap defendan pertama berdasarkan kausa tindakan tort misfeasans yang dilakukan di dalam pejabat awam. Plaintif menghujahkan defendan pertama adalah seorang pegawai awam kerana beliau pada masa itu adalah, antara lain, Perdana

Menteri, Menteri Kewangan serta Pengerusi Lembaga Penasihat 1Malaysia Development Berhad ('IMDB'). Plaintif mendakwa bahawa, dalam kapasiti-kapasiti tersebut, defendan pertama telah, antara lain, memainkan peranan secara langsung atau tidak langsung dalam keputusan-keputusan dan arahan-arahan 1MDB dan, dalam kapasiti itu, secara sengaja dan/atau melulu meluluskan beberapa perjanjian dan transaksi 1MDB mengakibatkan pelepasan dan penyalahgunaan dana 1MDB secara diam-diam dan menyalahi undang-undang. Menurut plaintif, defendan pertama tahu tindakannya akan membawa mudarat, kerugian dan kerosakan kepada seluruh rakyat Malaysia. Tuntutan plaintif-plaintif terhadap defendan kedua adalah Kerajaan Malaysia bertanggungjawab secara vikarius atas perkara-perkara yang diplidkan mengambil kira kapasiti defendan pertama sebagai pegawai Kerajaan dan tindakan-tindakan beliau dibuat dalam kapasiti awam. Defendan pertama dan kedua memfailkan lamp. 13 dan 26 di Mahkamah Tinggi untuk membatalkan writ saman dan pernyataan tuntutan plaintif di Mahkamah Tinggi. Permohonan-permohonan tersebut dibenarkan oleh Mahkamah Tinggi. Oleh itu, rayuan-rayuan ini. Isu-isu yang timbul adalah (i) sama ada defendan pertama seorang 'pegawai awam'; dan (ii) sama ada, tanpa definisi tertentu 'pegawai awam', untuk tujuan undang-undang tort misfeasans di Malaysia, maksud common law yang diberi pada istilah itu boleh diterima pakai.

Diputuskan (menolak rayuan-rayuan)
Oleh Yeoh Wee Siam HMR menyampaikan penghakiman mahkamah:

(1) Mahkamah tidak dibenarkan mengguna pakai maksud common law 'pegawai awam' jika terdapat undang-undang bertulis berkuat kuasa di Malaysia untuk mentafsirkan maksud perkataan-perkataan tersebut. Undang-undang bertulis adalah s. 3 Akta Tafsiran 1948 dan 1967 ('Akta'), iaitu satu statut tafsiran umum. Selepas mengambil kira definisi-definisi, antara lain, 'pegawai awam', 'perkhidmatan awam', 'Menteri' dan 'Perdana Menteri' dalam s. 3 Akta, serta per. 132(1), (3) dan 160(2) Perlembagaan Persekutuan atas tafsiran 'ahli pentadbiran', Mahkamah Rayuan dalam kes *Tun Dr Mahathir Mohamad & Ors v Datuk Seri Mohd Najib bin Tun Haji Abdul Razak* ('*Tun Mahathir*') memutuskan Perdana Menteri bukan 'pegawai awam.' Berikutan keputusan kes *Tun Mahathir* tersebut, yang menyatakan dengan jelas tafsiran statutori terma 'pegawai awam', mahkamah ini memutuskan yang sama untuk tujuan kes ini, iaitu defendan pertama, dalam kapasitinya sebagai Perdana Menteri, bukan 'pegawai awam.'

(2) Tafsiran statutori terma 'pegawai awam' setakat ini dalam kes undang-undang hanyalah untuk tujuan mentafsirkan undang-undang bertulis, tetapi tidak boleh digunakan tafsiran common law terma yang sama dalam undang-undang tort misfeasans di pejabat awam. Oleh itu, mengambil kira keputusan mahkamah ini bahawa defendan pertama

bukan pegawai awam, tuntutan plaintif terhadap defendan pertama jelas tidak mampan dan harus dibatalkan. Akibatnya, tuntutan plaintif terhadap defendan kedua berasaskan tanggungjawab vikarius defendan kedua untuk defendan pertama tidak boleh dipertahankan langsung dan harus dibatalkan. Tiada merit mewajarkan campur tangan rayuan.

Case(s) referred to:

Australian Capital Television Pty Ltd v. Commonwealth (No. 2) (Election/Electoral Advertising Bans/Free Speech) [1992] 108 ALR 577 ***(refd)***

Bandar Builders Sdn Bhd & Ors v. United Malayan Banking Corporation Bhd [1993] 4 CLJ 7 SC ***(refd)***

Jones v. Swansea City Council [1989] 3 All ER 162 ***(refd)***

Kerajaan Negeri Selangor & Ors v. Sagong Tasi & Ors [2005] 4 CLJ 169 CA ***(refd)***

Loh Kooi Choon v. Government of Malaysia [1975] 1 LNS 90 FC ***(refd)***

Minister of Finance, Government of Sabah v. Petrojasa Sdn Bhd [2008] 5 CLJ 321 FC ***(refd)***

Mohd Khir Toyo v. PP [2015] 8 CLJ 769 FC ***(refd)***

PP v. Datuk Tan Cheng Swee & Ors [1979] 1 MLJ 166 ***(refd)***

R v. Whitaker [1914] 3 KB 1283 ***(refd)***

Roncarelli v. Duplesis [1959] 16 DLR (2d) 689 ***(refd)***

Seruan Gemilang Makmur Sdn Bhd v. Kerajaan Negeri Pahang Darul Makmur & Anor [2016] 3 CLJ 1 FC ***(refd)***

Sivarasa Rasiah & Ors v. Che Hamzah Che Ismail & Ors [2012] 1 CLJ 75 CA ***(refd)***

Three Rivers District Council and Others v. Governor and Company of the Bank of England (No. 3) [2000] 3 All ER 1 ***(refd)***

Tun Dr Mahathir Mohamad & Ors v. Datuk Seri Mohd Najib Tun Hj Abdul Razak [2018] 4 CLJ 361 CA ***(refd)***

Legislation referred to:

Civil Law Act 1956, s. 3(1)(a)

Federal Constitution, arts. 43, 132(1)(a), (b), (c), (d), (e), (f), (g), (h), (3), 160(2)

Government Proceedings Act 1956, ss. 2, 5

Rules of Court 2012, O. 18 r. 19(1)(a), (b) (c), (d), (2), O. 92 r. 4

For the plaintiff/appellant - Gobind Singh Deo & Michelle Ng; M/s Gobind Singh Deo & Co

For the 1st defendant/respondent - Cecil Abraham & Nik Nuraisha Alia Hanfi; M/s Hafarizam Wan & Aisha Mubarak

For the 2nd defendant/respondent - Alice Loke; SFC

[Editor's note: For the High Court judgment, please see Tony Pua Kiam Wee v. Dato' Seri Mohd Najib Tun Hj Abdul Razak & Anor [2017] 10 CLJ 503 (affirmed).]

Reported by Suhainah Wahiduddin

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JUDGMENT

Yeoh Wee Siam JCA:

Introduction

[1] This judgment is in respect of the following two appeals heard together before this court on 13 April 2018:

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(i) Civil Appeal No. W-01(IM)(NCVC)-399-11-2017 ("Appeal No. 399");

(ii) Civil Appeal No. W-02(IM)(NCVC)-2293-11-2017 ("Appeal No. 2293")

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("the two appeals").

[2] In this judgment, the parties will be referred to as they were in the Kuala Lumpur High Court ("High Court") proceedings.

[3] The two appeals were filed by the plaintiff, Tony Pua Kiam Wee, against the whole of the decision of the High Court in allowing the respective striking out applications made by Datuk Seri Mohd Najib bin Tun Haji Abdul Razak ("the first defendant") (encl. 26), and by the Government of Malaysia ("the second defendant") (encl. 13").

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[4] Enclosure 13 was made under O. 18 r. 19(1)(a), (b) or (d), and/or O. 92 r. 4 of the Rules of Court 2012 ("ROC").

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[5] Enclosure 26 was made under O. 18 r. 19(1)(a), or (b), (c) and (d) of the ROC, and/or the inherent powers of the court.

[6] Both encls. 13 and 26 were to strike out the plaintiff's writ of summons ("writ") and the statement of claim ("SOC") in the High Court Civil Suit No. WA-21NCVC-5-01-2017 ("the suit").

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The Plaintiff's Claim

[7] The plaintiff is a Member of Parliament. He brought the suit against the defendant in his personal capacity and as a Malaysian taxpayer.

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[8] The plaintiff's SOC has set out extensively the plaintiff's claim in 161 paragraphs in 59 pages. The plaintiff's claim against the first defendant is based on the cause of action of the tort of misfeasance committed in public office. The plaintiff contended that the first defendant is a public official by virtue of then being a Member of Parliament, the President of the UMNO, Chairman of the Barisan Nasional (then the ruling coalition of Malaysia), the Prime Minister and Finance Minister, and the Chairman of the Board of Advisors for 1Malaysia Development Berhad ("1MDB").

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[9] The plaintiff alleged that in those capacities, the first defendant had, *inter alia*, a direct or indirect role in the decisions and directions of 1MDB, and had in such capacities knowingly and/or recklessly approved various 1MDB agreements and transactions which resulted in an unlawful and

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surreptitious dissipation and/or misappropriation of 1MDB funds. The first defendant had unlawfully received the sum of about USD731,000,000 and/or any other amount directly or indirectly from 1MDB funds of which a portion the plaintiff is a rightful beneficiary to. The first defendant had maliciously, knowingly and/or recklessly provided wrong and/or misleading replies to queries in Parliament to conceal the true facts of the various 1MDB transactions. The first defendant had knowledge that his conduct as referred to in the SOC will lead to loss, harm and damage to all Malaysian citizens, including the plaintiff.

[10] The plaintiff's claim against the second defendant is that the Government of Malaysia is vicariously liable for the matters pleaded in the SOC by virtue of the first defendant's capacity as a government servant and his acts done in his public capacity.

[11] Wherefore, the plaintiff claims against the defendant a declaration that the first defendant had committed misfeasance in public office, a declaration that the first defendant had abused his public office in personally benefiting and/or profiting from his receipt of 1MDB funds, and general damages, aggravated damages, exemplary damages, interest and costs.

Decision Of This Court

[12] On 13 April 2018, after having heard the submissions of respective learned counsels, and perused the appeal record, we made a unanimous decision to dismiss the two appeals with costs of RM5,000 to each of the defendants, subject to payment of the allocator fee in respect of only the first defendant. The decision of the learned Judicial Commissioner ("learned JC") is affirmed. The deposit is to be refunded to the plaintiff.

Grounds For Our Decision

The Law

[13] As correctly applied by the learned JC, the test of whether to allow a striking out application is to determine whether it is plain and obvious that the claim is unsustainable (see Federal Court decisions in *Bandar Builders Sdn Bhd & Ors v. United Malayan Banking Corporation Bhd* [1993] 4 CLJ 7; [1993] 2 AMR 1969; [1993] 3 MLJ 36 and *Seruan Gemilang Makmur Sdn Bhd v. Kerajaan Negeri Pahang Darul Makmur & Anor* [2016] 3 CLJ 1).

The High Court's Grounds For Dismissing The Striking Out Applications

[14] In order to determine whether the plaintiff's claim is obviously unsustainable, the learned JC required that all the ingredients of the tort of misfeasance in public office have to be proved by the plaintiff. This is what the learned JC stated in paras. 35 and 36 of her grounds of judgment ("judgment"):

> [35] in my view, based on the ingredients of the tort of misfeasance in public office defined by the House of Lords in *Three Rivers District Council And Others v. Bank of England (No. 3)*, for the Plaintiff to succeed in his claim

against D1 on the tort of misfeasance in public office with respect to the alleged 1MDB related actions, the Plaintiff must establish all, and not just some of the ingredients of the tort, which ingredients are as follows:

(i) that the Plaintiff has sufficient antecedent legal rights or interest to sue D1 for the alleged misfeasance in public office;

(ii) D1 is public officer;

(iii) D1 when committing the 1MDB related actions acted either

(a) with the specific purpose of injuring the Plaintiff (first form of the tort); or

(b) with the knowledge that his act would probably injure the Plaintiff (second form of the tort);

(iv) D1's action caused the Plaintiff's loss and damage; and

(v) the Plaintiff's loss and damage are recoverable.

[36] The applicable test for recoverability of loss and damages caused by misfeasance in public office is the test of knowledge ie, the plaintiff must prove that D1 specifically targeted the plaintiff or D1 knew that his decision would probably damage the plaintiff or a person of a class of which the Plaintiff is a member. As discussed in paragraph [28] above, the House of Lords expressly rejected the test of reasonable foreseeability and held that the applicable test is the test of knowledge.

[15] In the "conclusion" to her judgment, the learned judge stated the following in paras. 76 to 78:

[76] In this instant case, this Court finds that the Plaintiff has failed to establish in his pleadings any of the ingredients of the tort. Among the key ingredients the Plaintiff must establish is *locus standi*, which for the reasons discussed above, this Court finds he is not able to establish. The other key ingredient that the Plaintiff has to prove is D1's state of mind when committing the alleged 1MDB related actions. Unlike other torts where the test of reasonable foreseeability is sufficient, the applicable test for the tort of misfeasance in public office is the test of knowledge that the action would probably damage the Plaintiff. The Plaintiff must prove on a balance of probabilities that D1 committed the alleged 1MDB related action and that when D1 committed the acts (i) he knew that the acts were unlawful; (ii) he knew or was recklessly indifferent that the acts would cause (a) the Plaintiff's taxpayers' monies to be used in the future to honour the Government's guarantees and undertakings for the 1MDB bonds, (b) the significant devaluation of the Ringgit Malaysia, (c) the travel ban imposed on the Plaintiff, and (iii) the acts would cause the Plaintiff to suffer a loss of reputation because of (ii)(a), (b) and (c).

[77] Much has been said in the press and social media following the High Court's finding in *Tun Mahathir Mohamad* that D1 as Prime Minister is not a public officer, which finding was affirmed by the Court of Appeal. However, as discussed in this judgment, the fact that D1 is a public officer is not the sole determinant of whether the plaintiff has a reasonable cause

of action against D1 for the tort of misfeasance in public office. Therefore, in the event the Federal Court reverses the decisions of the High Court and the Court of Appeal in *Tun Dr Mahathir Mohamad* and finds that D2 as Prime Minister is a public officer, the plaintiff would still have to establish all the other ingredients of the tort of misfeasance in public office in order to have a reasonable cause of action in the tort against D1.

[78] For all the reasons above, this Court finds that the Plaintiff has not been able to establish any of the ingredients required to found a *prima facie* case of tort of misfeasance in public office against D1. In my judgment, the Plaintiff's failure to establish these necessary ingredients renders his cause of action for the tort of misfeasance in public office against D1 obviously unsustainable.

Our Consideration

[16] With respect, we find that the learned JC had erred in fact and in law in descending into the arena of the trial by requiring each and every ingredient as stipulated in para. 35 of her judgment to be proved by the plaintiff at the interlocutory stage.

[17] The only issue to be decided by the High Court in considering the two striking out applications is to determine respectively under O. 18 r. 19(1)(a), (b), (c) or (d), and O. 92 r. 4 of the ROC whether the plaintiff's pleading as contained in the SOC should be struck out on the ground that:

(a) it discloses no reasonable cause of action or defence, as the case may be;

(b) it is scandalous, frivolous or vexatious;

(c) it may prejudice, embarrass or delay the fair trial of the action; or

(d) it is otherwise an abuse of the process of the Court.

[18] In fact, under O. 18 r. 19(2) of the ROC, no evidence shall be admissible on an application under O. 18 r. 19(1)(a) of the same Rules. Thus, except for ingredient (ii) in para. 35 of the judgment, we do not think that the plaintiff is required to prove all the other ingredients listed out by the learned JC. Ingredient (i) would be in respect of the *locus standi* of the plaintiff to institute and maintain the action. Ingredients (iii)(a) and (b), and ingredients (iv) and (v) on loss and damage have to be proved, and therefore would require oral evidence to be adduced in court. In our opinion, all these other ingredients clearly amount to serious and complex disputes in fact and in law which ought to go for trial with witnesses called to give oral evidence and be subject to cross-examination. The complicated factual matrix and several legal issues arising therefrom are evident from a perusal of the plaintiff's pleading in the SOC itself. In our view, there are obvious triable issues which cannot be decided summarily based on affidavit evidence alone. In support of this, we now restate what the Court of Appeal had said in *Sivarasa Rasiah & Ors v. Che Hamzah Che Ismail & Ors* [2012] 1 CLJ 75; [2012] MLJ 473 at p. 83 (CLJ); pp. 479 and 480 (MLJ):

[14] A striking out application is not a trial on affidavit. It is not an application where the parties have to adduce evidence to establish the merits of their case. The court should not conduct a minute examination of the documents and the facts of the case. So long as the claim on the face of it discloses some cause of action or raises some question fit to be tried it should not be struck out. The mere fact the case is weak and not likely to succeed is no ground for the pleadings to be struck out.

[15] A striking out order should not be made summarily by the court if there is issue of law that requires lengthy argument and mature consideration. It should also not be made if there is issue of fact that is capable of resolution only after taking *viva voce* evidence during trial, (see *Lai Yoke Ngan & Anor v. Chin Teck Kwee & Anor* [1997] 2 MLJ 565 (Federal Court)).

[16] The test for striking out as laid down by the Supreme Court in *Bandar Builder*'s case is that the claim on the face of it must be 'obviously unsustainable'. The stress is not only on the word 'unsustainability' but also on the word 'obviously' i.e. the degree of unsustainability must appear on the face of the claim without having to go into lengthy and mature consideration in detail. If one has to go into a lengthy and mature consideration in detail of the issues of law and/or fact, then the matter is not appropriate to be struck out summarily. It must be determined at trial.

Whether The First Defendant Is A Public Officer

[19] Having decided that the other ingredients have to go for trial, we are now left with the ingredient on whether the first defendant is a public officer. In our opinion, this ingredient is the pivotal issue which can be decided at the interlocutory stage. It is the threshold issue upon which the plaintiff's claim is based. The plaintiff can only maintain his claim and go for trial on the other ingredients if he can prove that the first defendant is a public officer. If the plaintiff fails to prove this, the plaintiff's claim is doomed to fail at the interlocutory stage and ought to be struck out pursuant to the two striking out applications. In other words, there can be no cause of action grounded on the tort of misfeasance in public office if the plaintiff is not able to prove that the first defendant is a public officer.

Vicarious Liability Of The Second Defendant

[20] The plaintiff pleaded that the second defendant is vicariously liable for the acts of the first defendant (see paras. 3 and 160 of the SOC). As submitted by learned Senior Federal Counsel ("SFC") for the second defendant, the liability of the second defendant as a principal/employer in tort can only arise as provided in s. 5 of the Government Proceedings Act 1956 ("GPA").

[21] Under the said s. 5, the Government shall be liable "for any wrongful act done or any neglect or default committed by any public officer in the same manner and to the same extent as that in which a principal, being a private person, is liable for any wrongful act done or any neglect or default committed by his servant."

[22] For the second defendant to be liable, the conditions in s. 5 of the GPA must first be fulfilled. The principal tortfeasor must be a public officer. However the term "public officer" is not defined in the GPA. What is defined in s. 2 of the same Act is only the word "officer." Learned SFC then made reference to the Interpretation Acts 1948 and 1967 (Act 388) ("Interpretation Acts") which define a "public officer". She also relied on art. 132(1) and 132(1)(a) - (h) of the Federal Constitution on the meaning of "public services", and on arts. 132(3) and 160 of the said Constitution on the meaning of "office of any member of the administration", and "member of the administration" respectively. Learned SFC then submitted that based on the above, and on the decision of the Federal Court in *Minister of Finance, Government of Sabah v. Petrojasa Sdn Bhd* [2008] 5 CLJ 321; [2008] 4 MLJ 649 which affirmed the definition of "public officer" to exclude a Minister by referring to the provisions in the Interpretation Acts and arts. 132(1) and 160 of the Federal Constitution, the first defendant is not a public officer within the meaning of the GPA. Consequently, the second defendant cannot be made vicariously liable for the acts of the first defendant.

The Plaintiff's Submissions

[23] The plaintiff came up with a new perspective on the interpretation of the term "public officer" (or "the term"). In the law of tort, there is no common law definition of such term. Nonetheless, the plaintiff submitted the following persuasive argument in his attempt to convince this court that the first defendant is a public officer:

[24] The learned JC had decided that the first defendant is not a public officer as she was bound by the decision of the Court of Appeal in *Tun Dr Mahathir Mohamad & Ors v. Datuk Seri Mohd Najib Tun Hj Abdul Razak* [2018] 4 CLJ 361. In that case, the Court of Appeal decided that the Prime Minister is not a public officer by virtue of s. 3 of the Interpretation Acts read together with arts. 132 and 160 of the Federal Constitution.

[25] The plaintiff submitted that in *Tun Dr Mahathir (supra)*, the Court of Appeal fell into error when it used statutory interpretation for a common law tort. The statutory definition of "public officer" should not be used in construing the common law tort of misfeasance. In the absence of a specific definition for the term for the purpose of the common law of tort, the plaintiff urged the court to look at some meanings which have been given to "public officer" in decided cases.

[26] In *PP v. Datuk Tan Cheng Swee & Ors* [1979] 1 MLJ 166 at p. 177D, the Federal Court said:

> A public officer for the purpose of the Ordinance No. 22 of 1970 is by reason of the use of the word "includes" in contradistinction to the narrower term "means", not restricted to the class of persons in temporary or permanent employment of a public body. **We shall not attempt, even if we are capable of it, an exhaustive definition of a public officer, where the Legislature has failed to provide**. (emphasis added)

[27] In the celebrated decision of *Three Rivers District Council and Others v. Governor and Company of the Bank of England (No. 3)* [2000] 3 All ER 1, the House of Lords, in construing the tort of misfeasance, held that the definition of "public officers" for the purposes of the tort of misfeasance in public office is "a broad concept" that applies to "those vested with governmental authority and the exercise of executive powers".

[28] The Privy Council in *Crawford Adjusters (Cayman) Ltd v. Sagicor General Insurance (Cayman) Ltd* [2014] AC 366 (PC) at p. 416, in regard to the tort of misfeasance in public office, said:

> **The tort may be committed by any person performing a public function notwithstanding that he is not actually employed in the public service**: *Henly v. Lyme Corpn* [1828] 5 Bing 91, 107-108. As Lord Steyn put it in *Three Rivers District Council v. Governor and Company of the Bank of England (No. 30)* [2003] 2 AC 1, 190, malice is a condition of liability notwithstanding the general rule that it is irrelevant in the law of tort, because "the rationale of the tort is that in a legal system based on the **rule of law, executive or administrative power 'may be exercised only for the public good' and not for ulterior and improper purposes**." (emphasis added)

[29] In *R v. Whitaker* [1914] 3 KB 1283, at p. 1296, "public officer" has been defined as "an officer who discharges any duty in the discharge of which the public are interested, more clearly so if he is paid out of a fund provided by the public. If taxes go to supply his payment and the public have an interest in the duties he discharges, he is a public officer."

[30] Therefore, the plaintiff submitted, it is not the legal or juridical status of the power but the nature of the office which is the important consideration. This is clear from the decision of the Court of Appeal in *Jones v. Swansea City Council* [1989] 3 All ER 162 at p. 175, which held as follows:

> The essence of the tort, as I understand it, is that **someone holding public office** has misconducted himself by purporting to exercise powers which were conferred on him not for his personal advantage but for the benefit of the public or a section of the public either with intent to injure another or in the knowledge that he was acting *ultra vires*. All powers possessed by a local authority, whether conferred by statute or by contract, are possessed 'solely in order that it may use them for the public good': see *Wade Administrative Law* (6th edn, 1988) p. 400. In the present context, in my judgment, **it is not the juridical nature of the relevant power but the nature of the council's office which is the important consideration. It is the abuse of a public office which gives rise to the tort**. Counsel for the council frankly accepted that there is no authority which would preclude this court from holding that (assuming the truth of the fact alleged in the statement of claim) and action would lie at the suit of the plaintiff. I would so hold. (emphasis added).

[31] The plaintiff also relied on the decision of the Supreme Court of Canada in *Roncarelli v. Duplesis* 16 DLR (2d) 689, which held the Prime Minister and the Attorney General of Quebec liable for this tort when they revoked the appellant's liquor licence in retaliation for the appellant's bailing out the Jehovah Witnesses. A

[32] The question that arises in the present case is whether, in the absence of a specific definition of "public officer" for the purposes of the law of the tort of misfeasance in Malaysia, the common law meaning accorded to the term can be adopted and used. To ascertain that, we have to consider the basis for the application of common law in this country. B

[33] Section 3 of the Civil Law Act 1956 ("CLA") provides: C

> (1) Save so far as other provision has been made or may hereafter be made by any written law in force in Malaysia, the Court shall:
>
> (a) In Peninsular Malaysia or any part thereof, **apply the common law of England and the rules of equity as administered in England on the 7 April 1956**; D
>
> (b) In Sabah, apply the common law of England and the rules of equity, together with statutes of general application, as administered or in force in England on 1 December 1951;
>
> (c) In Sarawak, apply the common law of England and the rules of equity, together with statutes of general application, as administered or in force in England on 12 December 1949, subject however to subparagraph (3)(ii): E
>
> Provided always that the said common law, rules of equity and statutes of general application shall be applied **so far only as the circumstances of the States of Malaysia and their respective inhabitants permit and subject to such qualifications as local circumstances render necessary**. (emphasis added) F

[34] The plaintiff submitted that based on s. 3(1)(a) of the CLA and the proviso to the subsection, it is beyond dispute that under common law, the said tort is applicable to the Prime Minister unless the "local circumstances" and "local inhabitants" in Malaysia prohibit or limit its application. G

[35] According to the plaintiff, Malaysia operates as a democracy. It is a form of government in which sovereign power resides in the people as a whole. It is for this reason that the people elect their representatives to Parliament, a body which represents the will of the people. The plaintiff cited the *dicta* of Gopal Sri Ram JCA (as he then was) in *Kerajaan Negeri Selangor v. Sagong Tasi* [2005] 4 CLJ 169; [2005] 6 MLJ 289 where at p. 193 (CLJ); p. 312 (MLJ) he observed: H

> In a system of Parliament democracy modelled along *Westminster* lines, it is Parliament which is made up of the representatives of the people that entrusts power to a public body. It does this through the process of I

A legislation. The donee of the power - the public body - may be a Minister of the Crown or any other public authority. **The power is accordingly held in trust for the people who are, through Parliament, the ultimate donors of the power**. It follows that every public authority is in fact a fiduciary of the power it wields. Sometimes the power conferred is meant to be exercised for the benefit of a section or class of the general public, as is
B the case here. At other tunes it is to be exercised for the general good of the nation as a whole, that it to say, in the public interest. **But it is never meant to be misused or abused. And when that happens, the courts will intervene in the discharge of their constitutional duty**. (emphasis added)

C (See also *Australian Capital Television Pty Ltd v. Commonwealth (No. 2) (Election/Electoral Advertising Bans/Free Speech)* [1992] 108 ALR 577 at p. 593, and *Loh Kooi Choon v. Government of Malaysia* [1975] 1 LNS 90; [1977] 2 MLJ 187 at p. 187 at p. 188).

[36] In *Mohd Khir Toyo v. PP* [2015] 8 CLJ 769; [2015] 5 MLJ 429, the
D Federal Court at p. 815 (CLJ); pp. 474 and 475 (MLJ), decided that a Minister who was paid by the Government and is entrusted with a public duty is a public servant and can be charged for offences committed in office:

[77] ... **And as Chief Minister, the appellant was paid by Government and entrusted with the performance of a public duty**, which meant that he was
E an 'officer' under s. 21(i) of the Code (*GA Monterio v. State of Ajmer* AIR [1957] SC 13 at p 15, which was followed in *The State Of Ajmer (Now Rajasthan) v. Shivji Lal* [1959] SCR Supl (2) 739; *The State Of Gujarat v. Manshankar Prabhasankar Dwivedi* AIR [1973] 330 at p 333). **Even on one factor alone, namely appointment to the office for the performance of a**
F **public duty, the appellant was a 'public servant'** (*Queen-Empress v. Parmeshar Dat* [1886] ILR 8 All 201 at p 202; *The Queen v. Ramkrishna Das & Ors* [1871] Bengal Law Reports (Vol VII) 446 at p 448) and an 'officer' (*Ismail Mohamed Hajee And Other v. The King (28)* AIR [1941] Rangoon 349 at 350; *Emperor v. Karam Chand Gobind Ram* [1944] 45 Cr LJ 64 at p 65). For pursuant to explanation 2 s. 21 IPC, which is identical to explanation
G 2 of s. 21 of the Code, anyone in actual possession of the situation of a public servant is a public servant, notwithstanding any defect in the appointment (*Bajrang Lal & Anor v. State Of Rajasthan* [1976] Cri LJ 727 at p 730; *Brijbehari v. Emperor* (28) AIR [1941] Patna 539 at p 542). (emphasis added)

H **[37]** The Federal Court in the above case has determined that a "public servant" or "public official" can be convicted by the court for the offences they had committed despite the definition provided under the Federal Constitution and/or the Interpretation Acts.

[38] We observe here, however, that *Mohd Khir bin Toyo* (*supra*) is a
I criminal case. The decision in that case is regarding the meaning of the term "public servant", and not "public officer" as in the present civil case. Thus, that decision is not applicable or persuasive here.

The Defendants' Submissions

[39] On the whole, we find that the respective defendants' submissions have been accepted to a large extent by the High Court. The defendants, in particular the first defendant, and even the learned JC relied on the decision in *Tun Dr Mahathir* (*supra)*, regarding the definition of "public officer" which have been given in our statutes. In brief, the following approach and interpretations, as set out by the Court of Appeal in *Tun Dr Mahathir*, have been adopted by the defendants and the learned JC in the present case.

[40] Pursuant to s. 3(1) of the CLA, where there is no written law in force in Malaysia after the coming into force of the CLA on 7 April 1956, then the common law of England as administered on 7 April 1956 is to be applied. Thus, cases decided in England, including the House of Lord case, *Three Rivers* (*supra*), decided after 7 April 1956 "cannot just be accepted as our lock stock and barrel without regard to our written law".

[41] The Federal Court case of *Mohd Khir Toyo* (*supra*) where it was held that the appellant was a "public servant" in his capacities as the Menteri Besar of Selangor and Chairman of Perbadanan Kemajuan Negeri Selangor ("PKNS"), is a criminal case, and has no relevance to the issue in the civil case before the court.

[42] In our opinion, it is not permissible for the court to apply the common law meaning of "public officer" where there is written law in force in Malaysia to define the meaning of the words. The written law is s. 3 of the Interpretation Acts, which is a statute of general interpretation.

[43] After considering the definitions of "federal public office", "federal public officer", "public office", "public officer", "public services", "Minister", "police officer", "Prime Minister", and "written law" in s. 3 of the Interpretation Acts, and arts. 132(1), 132(3), and 160(2) of the Federal Constitution on the interpretation of "member of the administration", the Court of Appeal in *Tun Dr Mahathir* (*supra*) ruled that the Prime Minister is not a "public officer". We now cite paras. 43 and 44 at p. 42 of its judgment which have stated the position succinctly:

> [43] As can be seen, by virtue of section 3 of the Interpretation Acts, which must be read harmoniously with Articles 132(1), 132(3) and 160(2) of the Constitution, "public officer" and "Prime Minister" are two different entities. They are intended by Parliament to be different (Parliament does not legislate in vain). In fact, Article 132(3) of the Constitution expressly provides that the "public service" shall not be taken to comprise the office of any "member of the administration", to which the respondent belongs.
>
> [44] If that is not clear enough, then we should take a closer look at section 66 of the Interpretation Acts which provides that "Prime Minister" or "Perdana Menteri" means the person appointed as Prime Minister by

A the Yang di-Pertuan Agong under Article 43 of the Constitution. Contrast this with a "public officer", whose appointment is not by the Yang diPertuan Agong but by the Public Services Commission. Thus, the Prime Minister is not a public officer and a public officer is not a Prime Minister. The Prime Minister is a "member of the administration" whereas a public officer is a member of the "public services". The distinction is plain and
B obvious.

Consistent Position Of The Court

[44] In light of the decision of the Court of Appeal in the earlier case of *Tun Dr Mahathir* (*supra*) which spelt out clearly the statutory interpretation
C of the term "public officer" which the same court opined ought to apply to the common law interpretation of such term, and in harmony and being consistent with the position taken by the Court of Appeal in that case, we decided to similarly rule that for the purpose of the present case, the first defendant, in his capacity as the Prime Minister, is not a "public officer".

D **[45]** Our decision is also consistent with and fortified by the fact that the application of the appellants in the *Tun Dr Mahathir (supra)* case, for leave to appeal to the Federal Court, was dismissed by the Federal Court on 27 February 2018. As it stands now, therefore, the decision of the Court of Appeal in that case is still the authority on the matter. We see no reason or
E think it appropriate to depart from that decision. It is not for this court to review that decision in the present case, or to come up with another decision which is inconsistent with that decision. Suffice for us to state at this juncture that the submissions of the plaintiff in the present case are rather novel and persuasive on the point that the statutory interpretation of the term "public
F officer" thus far in our case law are only for the useful purpose of interpreting our written law, but cannot and must not be used for the common law interpretation of the same term in the law of tort of misfeasance in public office.

[46] Finally, unless the decision of the Court of Appeal in *Tun Dr Mahathir*
G *(supra)* is overruled by the Federal Court upon review of the leave application and then upon the hearing and disposal of the substantive appeal on the same issue, it is open for the plaintiff to apply for leave and to appeal our decision to the Federal Court for a final determination of what "public officer" means in the tort of misfeasance in public office in this country. We are of the
H considered opinion that it is timely either for the Federal Court, or even the Legislature if necessary, to decide on or provide for a clear definition of "public officer" for the specific purpose and application in the law of the tort of misfeasance in public office.

I

[47] In view of our decision that the first defendant is not a public officer, it follows that the plaintiff's claim against the first defendant is obviously unsustainable and ought to be struck out. Consequently, the plaintiff's claim against the second defendant grounded on the latter's vicarious liability for the first defendant cannot be sustained at all and ought to be struck out.

Conclusion

[48] Based on the foregoing considerations, we find no merit in the respective two appeals of the plaintiff to warrant our appellate intervention. Accordingly, the appeals are dismissed.